

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS**

**GENSETIX, INC.,**

**Plaintiff,**

**and**

**THE BOARD OF REGENTS OF THE  
UNIVERSITY OF TEXAS SYSTEM,**

**Involuntary Plaintiff,**

**v.**

**BAYLOR COLLEGE OF MEDICINE,  
DIAKONOS RESEARCH, LTD., and  
WILLIAM K. DECKER,**

**Defendants.**

Civil Action No. 4:17-cv-01025

**GENSETIX'S OPPOSITION TO DIAKONOS'S MOTION  
TO DISMISS THE FIRST AMENDED COMPLAINT [DKT. 55]**

Instead of simply joining BCM's motion to dismiss, Diakonos presents several arguments lifted nearly verbatim from BCM's motion with only non-substantive edits, such as changing the "BCM or Dr. Decker" references to "any defendant," modifying citations, correcting typographical errors, and adding statements of incorporation. Sometimes Diakonos does so expressly, as with its 12(b)(7) argument; other times, it does so less overtly, as with its arguments that Gensetix has not properly pled infringement, civil conspiracy, or declaratory judgment relief. As for Diakonos's arguments against the tortious interference claim, it makes the same points and repeats much of the same text as BCM's briefing. In short, Diakonos offers nothing new or

original. Therefore, rather than weigh the Court down with unnecessary additional briefing, Gensetix incorporates here all arguments presented in its opposition to BCM's motion to dismiss, and to the extent applicable, those in its opposition to Dr. Decker's motion to dismiss.<sup>1</sup>

There is one argument incorporated in Diakonos's motion to which Gensetix responds with an update: BCM's footnote contending that this Court should dismiss because Gensetix did not serve UT. *See* Diakonos Mot. at 4 (incorporating pages 2–12 of BCM's reply). Though Gensetix maintains that UT is not a necessary party and therefore should not be required to appear, as a protective measure, it nonetheless served UT with the First Amended Complaint on September 22, 2017. *See* Stip., Dkt. 58. Gensetix and UT have agreed that UT will file a response by November 6, 2017. *Id.* Accordingly, dismissal of claims against Defendants would not be appropriate. *See Manning v. Franklin*, No. CIV.A. H-14-2916, 2015 WL 4039388, at \*5 (S.D. Tex. June 16, 2015), *report and recommendation adopted as modified*, 2015 WL 4385989 (S.D. Tex. July 2, 2015) (“If the plaintiff fails to serve a defendant within that time period, Rule 4(m) allows the court to dismiss the action against the *unserved defendant*.” (Emphasis added.)); *see Mulugueta v. Nat'l Aeronautics & Space Admin.*, No. 4:16-CV-3593, 2017 WL 3506865, at \*1 (S.D. Tex. Aug. 15, 2017) (explaining that good cause to extend service deadline can be found when plaintiff shows excusable neglect, “good faith,” and

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<sup>1</sup> Of course, should the Court desire additional briefing specific to Diakonos, Gensetix would be willing to provide a separate, standalone response to Diakonos's motion.

“some reasonable basis for noncompliance” (quoting *Sys. Signs Supplies v. U.S. Dep’t of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990))); *id.* (“[E]ven in the absence of good cause, a district court retains discretion to . . . extend the time for service [under Rule 4(m).]” (internal citations and quotations omitted)).

### **CONCLUSION**

For all the reasons stated here and in Gensetix’s oppositions to BCM’s and Dr. Decker’s motions to dismiss, Gensetix asks the Court to deny Diakonos’s motion to dismiss.

Date: October 20, 2017

Respectfully submitted:

/s/ Christopher M. Bruno

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**CERTIFICATE OF SERVICE**

On October 20, 2017, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

*/s/ Christopher M. Bruno*  
Christopher M. Bruno

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**[PROPOSED] ORDER DENYING DIAKONOS'S MOTION  
TO DISMISS THE FIRST AMENDED COMPLAINT [DKT. 55]**

Having considered Diakonos's motion to dismiss [Dkt. 55] ("Motion"), Gensetix, Inc.'s opposition, and the applicable law, the Court **DENIES** the Motion.

**IT IS SO ORDERED.**

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2017

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HONORABLE MELINDA HARMON  
UNITED STATES DISTRICT JUDGE